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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on unfair business-to-business trading practices in the food supply chain

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1. INTRODUCTION

In July 2014, the Commission adopted a Communication on tackling unfair trading practices (UTPs) in the business-to-business food supply chain.[1] UTPs are practices that deviate grossly from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another. The Communication explained why the market structure of the food supply chain makes it particularly vulnerable to UTPs and described the damage that UTPs can do to operators with low bargaining power. To address the problem of UTPs, the Communication encouraged operators in the European food supply chain to participate in voluntary schemes aimed at promoting best practices and reducing UTPs, and emphasised the importance of effective and independent enforcement at national level.

In 2015, the discussion intensified, not least because of the difficulties faced by European farmers caused by falling prices for certain agricultural commodities, in particular dairy products and pigmeat. Demand for a number of products weakened significantly, and this was aggravated by the Russian import ban on agricultural products. At the same time, world production increased, leading to a general oversupply. While UTPs are not the cause of the recent price declines, the low prices have made farmers more vulnerable to potential unfair behaviour by their trading partners. In response to the challenges faced by farmers, the Ministers of Agriculture of seven countries[2] issued a joint statement asking the Commission to take its analysis on UTPs further and propose EU legislation to address UTPs.

The Commission responded to the farming crisis with a package of wide-ranging measures. Many of these target the dairy sector, which is particularly affected by the drop in prices. This report will not cover the UTP-specific measures already adopted for particular sectors. An Agricultural Markets Task Force will be set up to advise the Commission on specific aspects of the functioning of the agricultural markets and the farmers' position in the food chain. It will also make recommendations and propose relevant policy initiatives in this field.

This report concentrates on the existing frameworks for tackling UTPs. It has two main elements: (1) an assessment of the existing regulatory and enforcement frameworks in the Member States; and (2) an assessment of the impact of the voluntary EU-wide Supply Chain Initiative (SCI) and the national SCI platforms that have been set up.

This report concludes that measures to combat UTPs have developed significantly in recent years. Many Member States, especially those where the issue is more prominent, have recently introduced legislative and enforcement measures that broadly meet the criteria for effective frameworks against UTPs. In total, more than 20 Member States have introduced legislation or are planning to do so in the near future. While it is too early to assess the overall impact of this legislation, this report identifies a number of specific areas where there is further room for improvement. Regarding the voluntary Supply Chain Initiative, the report

[1] COM(2014)472 final
[2] Bulgaria, Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia

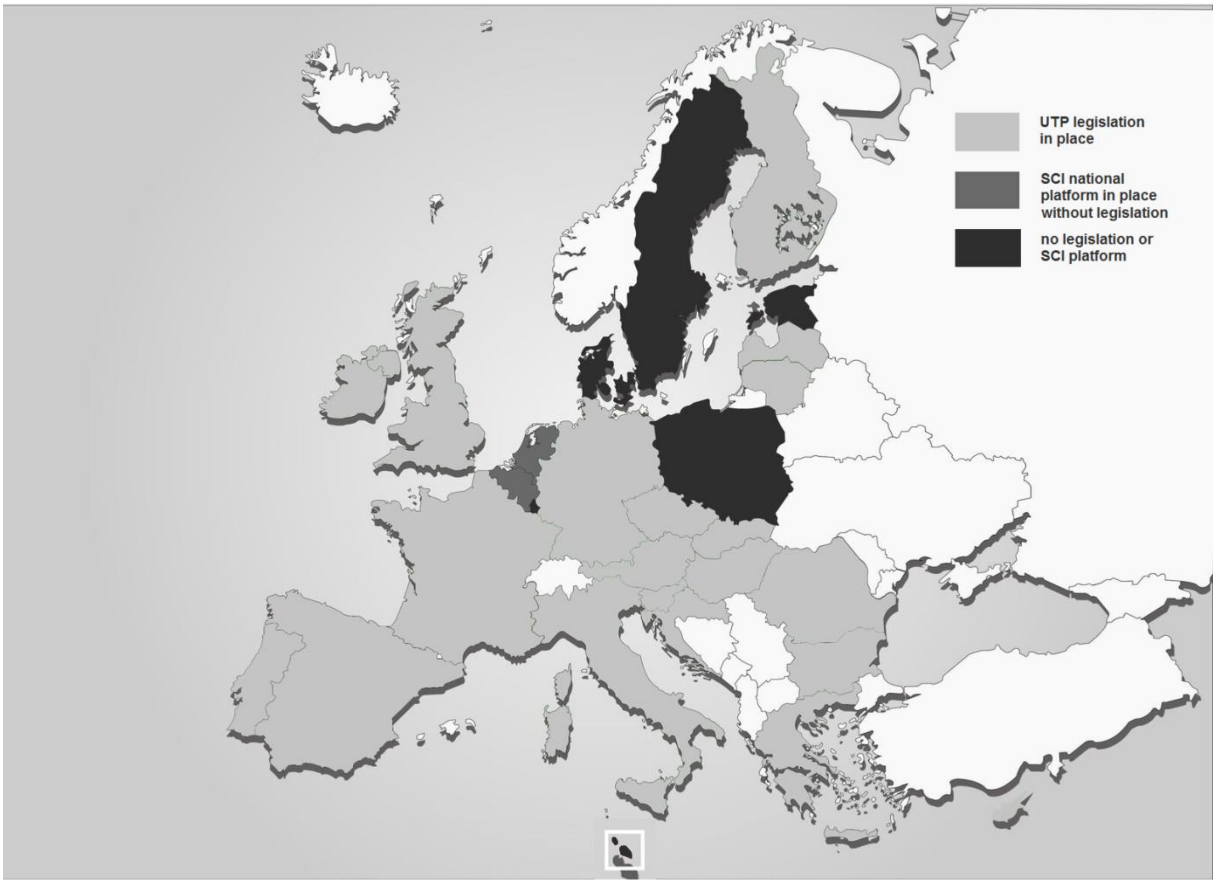
acknowledges the benefits achieved so far, but also suggests a number of possible enhancement measures to increase the credibility and effectiveness of the initiative.

2. REGULATORY AND ENFORCEMENT FRAMEWORKS IN MEMBER STATES

There is no EU legislation targeting business-to-business UTPs across the food supply chain.[3] EU competition law addresses abuses of a dominant position and anti-competitive practices, but most reported UTPs do not fall under competition law, because most actors are in a strong, but not dominant position. Some Member States have extended the application of the EU consumer protection legislation to business-to-business situations.[4] This concerns Directive 2005/29/EC on unfair commercial practices or Directive 93/13/EEC on unfair terms in consumer contracts. However, the practices addressed in the Directive are mostly different than the ones discussed in this report.

The situation is different at national level where most Member States have addressed UTPs using a variety of approaches, most of them regulatory, and some based on self-regulatory initiatives among market participants. In regulatory terms, the last few years have been a period of considerable change. More specifically, out of the 20 Member States that already have legislation[5], 15 have introduced it in the last 5 years[6]. A few more may consider legislation in the near future[7] and some of the Member States have enhanced their older frameworks in the last 5 years[8]. The figure below gives an overview of the current situation.

[3] Specific EU-wide rules on certain parts of the food chain have been introduced under the Common Agricultural Policy (CAP), including, inter alia, the possibility for Member States to require compulsory written contracts between farmers and processors or distributors with possible obligation for first purchasers to offer farmers minimum contract duration. Furthermore, the reformed CAP and Common Fisheries Policy strengthen the position of producers in the supply chain vis-à-vis downstream operators, notably by supporting the creation and development of producer organisations. The new Common Market Organisation also includes elements which aim at reducing the bargaining power gap between farmers and other parties in the food supply chain in some selected sectors (milk, olive oil, beef and veal, arable crops). In November 2015, the Commission published a set of guidelines to help market operators apply the new rules.
[4] For example in Austria, Denmark, France, Germany, Italy and Sweden.
[5] AT, BG, CY, CZ, DE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LV, PT, RO, SI, SK, UK
[6] BG, CY, CZ, ES, FI, HU, IE, IT, LT, LV, PT, RO, SI, SK, UK
[7] For example, Poland
[8] DE, EL, FR



In 2015, the Commission organised several meetings with Member States' ministries and enforcement authorities, to gather detailed information on the existing or planned regulatory frameworks. The fact-finding process was supported by bilateral follow-up discussions.

Five key elements are important for effective regulatory frameworks to address UTPs. These are described in the sections below. Member States may address these five elements differently, but the different approaches do not seem to have negative consequences for the single market[9]. Notwithstanding the overall assessment of the regulatory frameworks at national level which is satisfactory, the analysis below suggests where certain Member States could further enhance their regulatory framework and identifies opportunities for cooperation between Member States.

1) Coverage in the supply chain

Measures against UTPs address practices resulting mainly from economic imbalances. Most Member States have defined clear criteria to identify situations conducive to UTPs. The laws in the majority of the Member States apply to business–to-business (B2B) relationships in all stages of the supply chain. Some Member States apply legislation only to relationships in which one party is a retailer.[10]

[9] Generally, national regulatory frameworks apply also to cross-border relations.
[10] FI, HU, LT, LV, RO, UK

Looking ahead, given that UTPs can potentially occur at every stage of the chain, Member States that have not yet done so should consider introducing legislation that covers the entire B2B food supply chain. This is important in order to ensure that all smaller market operators have adequate protection from UTPs, as many small market operators do not deal directly with retailers. Member States should also ensure that their legislation covers operators from non-EU countries (for example, primary producers from Africa or Latin America).

2) Core types of UTPs

Member States with UTP legislation defined the unfair practices to be tackled based on their analysis of the market situation and practices in their country.

The analysis preceding this report[11] identified four key categories of UTPs that an effective regulatory framework should target:

- one party should not unduly or unfairly shift its own costs or entrepreneurial risks to the other party;
- one party should not ask the other party for advantages or benefits of any kind without performing a service related to the advantage or benefit asked;
- one party should not make unilateral and/or retroactive changes to a contract, unless the contract specifically allows for it under fair conditions;
- there should be no unfair termination of a contractual relationship or unjustified threat of termination of a contractual relationship.

Although Member States have chosen different legislative approaches and techniques, according to their legal traditions, the above core types of UTPs are broadly covered by all regulatory frameworks.[12]

To improve the common understanding between Member States regarding which specific types of business practice should be considered UTPs, Member States should exchange information and best practices concerning their national legislation and experience of enforcement in a coordinated and systematic way.

3) Flexibility vs rigidity in defining UTPs

Member States have chosen different legislative approaches to addressing abuses of economic imbalances. Some Member States, for example Germany and Austria, have general legal provisions requiring an assessment on a case-by-case basis[13] of whether there is a significant economic imbalance between two operators, and whether the stronger operator abused its position to impose unfair terms or conditions on the weaker party.

Other Member States, for example the Czech Republic, Slovakia and Hungary, have chosen to introduce more detailed UTP-specific legislation. Several of these laws contain extensive

[11] For example, the Commission's Green Paper on UTPs and its ensuing public stakeholder consultation.
[12] The core UTPs are also consistent with the principles established in the High Level Forum on a Better Functioning Food Supply Chain and the implementation framework of the Supply Chain Initiative.
[13] This could be in the context of a complaint or an own-initiative investigation.

lists of practices considered to be intrinsically unfair and thus illegal (blacklists), and where unfairness is not assessed on a case-by-case basis.

A potential advantage of the first, more general, approach is its flexibility and that it can capture imbalances throughout the supply chain, and different types of existing, or even newly created, UTPs. However, the general approach requires a very comprehensive assessment of both the economic and contractual circumstances in each individual case. As recent developments in Germany show, such general legislation can be rather difficult for national enforcement authorities to apply.[14]

The advantage of the second approach, i.e. more detailed UTP-specific legislation, is that enforcing it does not require comprehensive and resource-intensive factual investigations and legal assessments in every individual case. However, it may sometimes be difficult under this approach to take due account of the economic and contractual context of a single clause or practice, and this could raise concerns of proportionality.

Member States having chosen a general approach should ensure their laws can be applied in practice, impose manageable evidence requirements, and allocate sufficient resources to enforcement activities to ensure comprehensive and effective case-by-case assessments.

Member States with a UTP-specific approach should consider carefully whether their measures are proportionate, and the range and nature of the practices covered by their legislation. To ensure the UTP-specific approach remains proportionate Member States should: i) limit the UTPs that are intrinsically prohibited to certain core categories described in the previous section, and ii) assess other potentially unfair practices based on the contractual and economic background of the individual case.

4) Confidentiality of complaints and the possibility of own-initiative investigations

An effective enforcement system needs to address the weaker party's fear of compromising its commercial relationship when complaining openly to authorities about UTPs. This so-called "fear factor" can easily obstruct authorities from penalising market operators imposing UTPs because authorities require sufficient information to be able to follow up on a complaint.

Many Member States allow confidential formal complaints where the identity of the complainant is protected. Several allow aggregated complaints which better protect the identity of the complainant, or permit any interested party to lodge a complaint. This means that complainants do not need to act in person but can, for example, be represented by an association.

Member States have appointed different national enforcement authorities to address UTPs. This is sometimes the national competition authority and in other cases a dedicated body, such as a national ministry, a national food agency, or a national anti-fraud agency. These

[14] In a recent case concerning practices of leading German retailer EDEKA, a German regional court did not confirm the decision of the German competition authority of 3 July 2014 and its interpretation of the national legislation regarding UTPs.

authorities have the power to launch own-initiative investigations whenever there is sufficient indication that a company has been using UTPs prohibited under national legislation.

Own-initiative investigations launched by the enforcement authority are another important element in addressing the fear factor. They enable the victim of an unfair practice to inform the authority about alleged UTPs imposed by a stronger party, thereby triggering an own-initiative investigation if the enforcement authority believes that there are sufficient grounds.

Practically all Member States' enforcement systems allow confidential complaints and own-initiative investigations in order to address the fear factor.

Member States’ enforcement authorities should coordinate and exchange information and best practice on a regular basis in order to further improve the enforcement of measures to combat UTPs and to better address potential cross-border UTPs.

5) Deterrent effect

Measures to tackle UTPs must act as a real deterrent. Just how much of a deterrent they are is determined by the likelihood of unfair practices being investigated by an enforcement authority, and the level of the potential penalties or fines.

Intensity of enforcement practice

The actual number of investigations into alleged unfair trading practices differs significantly across Member States. Around a third of Member States with public enforcement had no cases in the last few years[15]; another third just investigated a few cases[16]; and the remaining third dealt with dozens or even more[17]. To some extent, this could be attributed to the different salience of the problem in the different Member States.

Differences in the approach taken to enforcing anti-UTP measures also matter: some enforcement authorities focus on resolving those conflicts with an effect at market level, while others try to resolve individual disputes. Thus, simply comparing the yearly number of investigations would not give an accurate picture of how effective the enforcement system is. Even one highly publicised comprehensive investigation at market level can act as a deterrent. Nevertheless, Member States without any recent cases should review their national situation.

Fines and other penalties

Most Member States have introduced fines for companies applying UTPs in breach of national law. In most, there is a maximum level of fines in absolute terms, but in some Member States, fines are calculated as a percentage of the annual turnover of the company that applied UTPs against its weaker business partner. The range goes from 0.05 % in one case up to 10 % of turnover in several other Member States.

[15] AT, BG, FI, HR, LV, RO, SI,

[16] CY, DE, IE, LT, UK

[17] CZ, ES, FR, HU, IT, PT, SK

A penalty may also be to 'name and shame', for example by publishing the name of the company that was found guilty. In order to act as a real deterrent, penalties should be high enough to outweigh any gain from imposing the UTP (although this can be difficult to quantify) and to influence behaviour at company level. But they should also be proportionate to the gravity of the conduct and its potential harm to the victim(s).

3. THE VOLUNTARY SUPPLY CHAIN INITIATIVE AND ITS NATIONAL PLATFORMS

3.1. Background

The Supply Chain Initiative (SCI) was developed within the framework of the Commission's High Level Forum for a Better Functioning Food Supply Chain.[18] The aim of the initiative is to increase fairness in commercial relations along the food supply chain. To this end, all market representatives involved in the Forum's working party on UTPs, including farmers' representatives, jointly agreed on a set of principles of good practice in vertical relationships in the food supply chain[19] in November 2011. However, in spite of significant efforts by all stakeholders, those involved in the food chain could not agree on a voluntary enforcement mechanism, as farmers and meat processors felt it did not address complainant confidentiality (the fear factor) and sanctions.

The SCI, a voluntary framework for implementing the principles of good practice was launched in September 2013.[20] Individual companies may join the SCI once they comply with the principles of good practice. Under the SCI, disputes between operators can be addressed through mediation or arbitration. The SCI focuses on organisational requirements at company level to prevent UTPs, including staff training and participation in dispute resolution mechanisms. Breaches of these organisational requirements can lead to the concerned company being excluded from the SCI. However, the SCI does not provide for any other type of sanction. Members of the SCI must ensure that the weaker parties using the dispute resolution mechanisms are not subject to commercial retaliation.

The SCI is managed by a Governance Group representing retailers and suppliers in the food supply chain. Farmers' representatives decided not to join the SCI since in their view it does not ensure sufficient confidentiality for complaining parties and does not provide for independent investigations and sanctions.

To date, a little more than two years after the launch of the SCI, 328 retail, wholesale and manufacturing groups and companies have registered, representing 1155 operating companies across all EU Member States. National platforms of the SCI have been established or are emerging in Belgium, Finland, Germany and the Netherlands (more details on national initiatives under 3.2.3).

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[18] http://ec.europa.eu/growth/sectors/food/competitiveness/supply-chain-forum/index_en.htm.
[19] http://www.supplychaininitiative.eu/about-initiative/principles-good-practice-vertical-relationships-food-supply-chain.
[20] http://www.supplychaininitiative.eu.

3.2. Assessment of the impact of voluntary initiatives

The Commission contracted an external research company to assess the SCI and its national platforms. The study it produced was based mainly on a survey among market operators in the food supply chain. The survey yielded more than 1 000 responses, both from members and non-members of the SCI and its national platforms. The study found that it was still very early to assess the full impact of the initiatives as they have only been set up in the last 2-3 years, with the exception of the Belgian initiative which dates from 2010. The following sections of this report take into account the main findings of the study.

3.2.1. Assessment of the SCI

Participation in the SCI has increased significantly in the two years since it was set up. However, SMEs, and farmers in particular, are still clearly under-represented. To some extent this may be caused by the limited awareness of the SCI in all Member States, especially among farmers and SMEs. As described above, low awareness among farmers may result from a lack of support of the initiative from farmer representatives who are concerned about a lack of confidentiality and independence within the initiative. The survey among market operators revealed a stark contrast in awareness of the SCI[21]: only 11 % of farmers and 15 % of wholesalers who responded had heard of the SCI while 48 % of retailers had. Similarly, awareness is much lower in SMEs (13 %) than in large companies (43 %). The costs incurred by SMEs to join the SCI are limited and do not appear to prevent them joining.

The overall level of trust in the SCI is high among companies who are aware of it. 72 % of survey respondents who know about the SCI say that they have a fairly high or very high level of trust in it. However, trust is lower in the farming, manufacturing and wholesale sectors (63 %) than in the retail sector (96 %). Some external stakeholders expressed doubts, in particular regarding the governance structure of the SCI. The fact that the members of the Governance Group represent stakeholder groups may be seen as restricting their impartiality.

The transparency of the SCI is generally appreciated by operators aware of the initiative and especially by its members. This pertains to information on the process and requirements to join the initiative, the rules of procedure and the evolution of the member base. Generally, information is clearly and effectively presented on the SCI's website. The SCI's internal monitoring system is based mainly on annual member surveys. While this approach is cost-effective it does not provide for spot checks or allow the actual implementation of member companies' commitments to the process to be monitored in a systematic way. Furthermore, information on bilateral disputes and how they were resolved under the SCI is based on survey responses and may therefore be incomplete.

The survey confirmed that UTPs can occur at any point in the food supply chain. It also showed that parties who say they are subject to UTPs often do not launch judicial proceedings, or attempt arbitration or mediation for fear of compromising their commercial

[21] Members of the SCI were over-represented in the survey. That implies that the awareness figures presented here overestimate the actual level of awareness of the SCI among market players.

relationship with the stronger trading party. On this basis, the external study identified the following strengths and weaknesses regarding the SCI's effectiveness in tackling UTPs:

Strengths:

- The SCI promotes cultural change concerning UTPs in the food supply chain.
- The dispute resolution options promoted by the SCI generally offer a faster and cheaper alternative to any judicial action.
- The SCI is an EU-wide initiative and could therefore facilitate the resolution of unfair practices with a cross-border dimension.

Weaknesses:

- In the eyes of a number of operators, the SCI lacks effective deterrents against UTPs.
- The SCI does not allow for individual confidential complaints by potential victims of UTPs or for own-initiative investigations by an independent body.
- Use of the available dispute resolution options has only been limited in the first two years of the SCI.[22]

The survey provided additional information on the experiences of economic operators since the launch of the SCI. 73 % of the survey respondents affirm that the situation concerning UTPs has not significantly changed since 2013. However, this percentage also includes those respondents that declared they had not been subject to UTPs at all in the last five years (53 % of all respondents). The majority of respondents saying they had experienced UTPs in the past five years felt the situation has improved (21 %) rather than worsened (6 %). The share of respondents who feel that the situation has improved is higher in the retail sector and lower among farmers, but in all sectors more respondents think the situation has improved than think it has worsened. Across all sectors, SCI members are significantly more likely to say that the situation has improved (56 %) than non-members (15 %).

In conclusion, there are first indications that the SCI has started to promote cultural change in the food supply chain, thereby potentially increasing fairness in commercial relation. It is still too early to make a robust assessment on whether the SCI has been effective in addressing or reduced UTPs. Nevertheless, the analysis identified a number of possible enhancements for the initiative that are described in the following section.

3.2.2. *How to improve the SCI*

On the basis of the findings above and previous work in the High Level Forum for a Better Functioning Food Supply Chain, the Commission suggests opening a dialogue with the relevant stakeholders on ways to improve the SCI and extent its participation to the entire food chain (including primary producers). The following actions should be taken:

- Step up efforts to publicise the SCI, especially among SMEs.

[22] In the SCI's first annual survey, only one lodged complaint and 39 received complaints (by 6 different companies) were reported. In the second annual survey, three lodged complaints and 39 received complaints (by 8 different companies) were reported.

- Ensure the impartiality of the governance structure, for instance by establishing an independent chair who is not affiliated to specific stakeholder groups.
- Allow alleged victims of UTPs to complain confidentially. Nominate an independent body with power to investigate and impose sanctions.
- Enhance internal processes to check that individual operators comply with their process commitments and to monitor the occurrence and outcome of bilateral disputes in a confidential manner.

3.2.3. *National platforms of the SCI*

Under the SCI, guidelines have been developed for the creation of so-called national platforms. Aspects covered by these guidelines include the composition, rules of procedure and awareness raising activities of national initiatives. On this basis, a process of mutual recognition can be launched between the SCI and a national initiative to officially establish a platform. Such platforms have to date been established in Belgium, the Netherlands and Finland. In Germany, stakeholder associations throughout the food supply chain, including farmer representatives, are envisaging setting up a similar platform.

The external study has shown that awareness about SCI is higher in those countries than elsewhere in Europe. Furthermore where a national platform is in place, awareness of that platform is not higher than awareness of the SCI. There is also evidence that both the EU-wide principles of good practice and the SCI acted as a catalyst for developing the national platforms.

The Belgian initiative (established in May 2010) pre-dates the EU-wide SCI and therefore had more time to have an impact. In June 2014, the initiative has been recognised as a national platform of the SCI. The members of the Belgian platform and external observers broadly agree that it delivered significant results. Support from stakeholders at all the levels of the food supply chain, including farmers, appears to have helped make the platform more effective. In the absence of national legislation on UTPs, the platform offers operators in Belgium a certain level of protection from UTPs. This is one of the main reasons it is considered so effective.

The Dutch platform was officially launched at the same time as the SCI. Dutch farmers' representatives joined the platform. The platform was developed as a national pilot project on the basis of the EU-wide SCI. The pilot was initially planned to last for one year, but was later extended for another year to give it more time to produce results.

The Finnish platform was launched in January 2014. Consequently, it has had little time to have effect. It originally comprised stakeholders throughout the supply chain, including farmers. However, in September 2015 the national farmers’ union withdrew pointing out that no cases were brought forward in the first year and a half of its existence, meaning they did not consider the initiative as an efficient tool in ensuring a better functioning, balanced food chain. This setback will probably not help the platform deliver more tangible results in the near future.

4. CONCLUSIONS

The Commission Communication of July 2014 suggested a combination of voluntary initiatives and regulatory measures to tackle UTPs. In this respect, there has been significant progress over the last few years.

Voluntary initiatives: The EU-wide Supply Chain Initiative has been launched and gained significant participation. This stimulated the discussion of best practices and UTPs among operators and started to induce a cultural change in the food supply chain. Several national platforms have been established under the EU-wide initiative which is another positive signal. This report has found that voluntary initiatives seem to work better in some countries than in others. Belgium's initiative is an example of where a voluntary platform seems to be an efficient approach to tackling UTPs, meaning a regulatory system does not seem to be required. In other countries, for example the United Kingdom, voluntary initiatives were less successful, confirming the need for regulatory measures and effective independent enforcement.

Regulatory frameworks: The fact that the large majority of Member States have introduced regulatory measures and public enforcement systems is a very important development. Some Member States have gone further than others, but almost all the legislative enforcement systems introduced go beyond the normal judicial redress through courts, thereby addressing the 'fear factor' of the potential victims of UTPs. Therefore, given the positive developments in parts of the food chain and since different approaches could address UTPs effectively, the Commission does not see the added value of a specific harmonised regulatory approach at EU level at this stage. However the Commission recognises that, since in many Member States legislation was introduced only very recently, results must be closely monitored, and reassessed, if necessary.

Belgium and the Netherlands do not have a regulatory framework, but have opted for a national voluntary platform. The few remaining Member States without UTP legislation could benefit from following their example and considering at least a national voluntary platform.

As regards voluntary initiatives, the Commission concludes that the SCI has already accomplished some achievements but there is still room for improvement. In order to increase the initiative's credibility and effectiveness in tackling UTPs, the Commission proposes a discussion with the relevant stakeholders on how to improve the SCI under the High Level Forum for a Better Functioning Food Supply Chain. The objective is to improve awareness of the SCI, especially among SMEs, ensure the impartiality of the SCI's governance structure, allow alleged victims of UTPs to complain confidentially and grant investigatory and sanctioning powers to independent bodies.

The Commission will continue to monitor closely the situation regarding both the voluntary and regulatory frameworks. The Commission's High Level Forum for a Better Functioning Food Supply Chain will continue the dialogue with operators, Member States and other stakeholders on ensuring the promotion of good practices, the emergence of national platforms and, in particular, the enhancement of the SCI. In any event, before the end of its

mandate the Commission will re-assess the potential added value of EU action to address UTPs in the light of new developments, or a lack thereof.